No. 86-943 (2)

Supreme Court, U.S.
FILED
JAN 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERADA HESS CORPORATION, AMOCO PRODUCTION COMPANY, APACHE CORPORATION, ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL AND GAS CORPORATION, DEVON ENERGY CORPORATION, EXXON CORPORATION, INEXCO OIL COMPANY, KIRBY EXPLORATION COMPANY, MARATHON OIL COMPANY, MERIDIAN OIL PRODUCTION, INC., MUSTANG PRODUCTION COMPANY, SAMEDAN OIL COMPANY, SUN EXPLORATION AND PRODUCTION COMPANY, and TENNECO OIL COMPANY,

Appellants,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,

Appellee.

On Appeal from
the Supreme Court of Oklahoma

MOTION TO AFFIRM OR DISMISS

LINDIL C. FOWLER, JR.
General Counsel
GRETCHEN P. HOOVER
Deputy General Counsel
Corporation Commission of
the State of Oklahoma
460 Jim Thorpe Building
2101 N. Lincoln Blvd.
Oklahoma City, Oklahoma 73105
(405) 521-2255
Counsel for Appellee

January 8, 1987

13pp

QUESTIONS PRESENTED

Whether the Oklahoma Corporation Commission's ratable sharing of revenues order and the statutory and regulatory authority upon which it is based:

(1) conflict with the recent decision in *Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board,* — U.S. —, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986) ("*Transco*"), holding unconstitutional on preemption grounds a Mississippi regulation which required ratable taking of gas by pipeline purchasers among wells producing from a common source of supply.

(2) unconstitutionally deprive Appellants of due process of law, U.S. CONST. amend. XIV, § 2, by requiring the ratable sharing of revenues among those sharing interests in production.

(3) unconstitutionally impair the obligation of contracts in violation of U.S. CONST. art. I, § 10, cl. 1, in its application to proceeds of production received after the effective date of the legislation but under contracts entered into prior to such effective date.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iii

STATUTES INVOLVED iv

STATEMENT OF THE CASE 2

ARGUMENT 3

I. Appellants' Alleged Federal Regulatory "Scheme" With Which The Questioned State Statutes Conflict Does Not Exist 3

II. Appellants Have Not Been Deprived Of Due Process Of Law By Requiring The Ratable Sharing Of Revenues Among Those Sharing Interests In Production 5

III. There Is No Impairment Of Obligation Of Contracts In The State Statutes' Application To Proceeds Of Production Received After The Effective Date Of The Legislation But Under Contracts Entered Into Prior To Such Effective Date 7

CONCLUSION 7

TABLE OF AUTHORITIES

Constitution

U.S. CONST. art. I, § 10, cl. 1 i
U.S. CONST. art. VI, cl. 2 5
U.S. CONST. amend. XIV, § 2 i

Page

Statutes

15 U.S.C. §§ 3301 et seq. 4
52 Okl. Stat. §§ 541-547 (West Supp. 1986) ... 1, 2
52 Okl. Stat. § 541 (West Supp. 1986) 2
52 Okla. Stat. § 544 (West Supp. 1986) 2, 4, 5
52 Okl. Stat. § 546 (West. Supp. 1986) 4
52 Okl. Stat. § 547 (West Supp. 1986) 2

Cases

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 7

Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210 (1932) 1, 5, 7

Cities Service Gas Co. v. Peerless Oil & Gas Co., 340 U.S. 179, 186 (1950) 7

Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400 (1983) 7

Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) 7

Hunter Company, Inc. v. McHugh, 320 U.S. 222, 227 (1943) 6

Transcontinental Gas Pipeline Corp. v. State Oil and Gas Board, — U.S. —, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986) ..... i, 3, 4, 5, 7

No. 86-943

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

AMERADA HESS CORPORATION, AMOCO PRODUCTION COMPANY, APACHE CORPORATION, ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL AND GAS CORPORATION, DEVON ENERGY CORPORATION, EXXON CORPORATION, INEXCO OIL COMPANY, KIRBY EXPLORATION COMPANY, MARATHON OIL COMPANY, MERIDIAN OIL PRODUCTION, INC., MUSTANG PRODUCTION COMPANY, SAMEDAN OIL COMPANY, SUN EXPLORATION AND PRODUCTION COMPANY, and TENNECO OIL COMPANY,

Appellants,

v.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA,

Appellee.

MOTION TO AFFIRM OR DISMISS

Appellee moves the Court to affirm the judgment of the Supreme Court of Oklahoma or, in the alternative, to dismiss the appeal herein on the ground that the jurisdictional questions presented by Appellants do not present a substantial federal question. Further, the State's power to regulate production of gas and to limit the rights of producers of gas in their exertion of ownership was definitively decided by the Court in *Champlin Refining Co. v. Corporation Commission of Oklahoma,* 286 U.S. 210 (1932).

STATUTES INVOLVED

52 Okl. Stat. §§ 541-547 (West Supp. 1986) appear in Appellants' Jurisdictional Statement at Appendix E.

STATEMENT OF THE CASE

On May 3, 1983, Enrolled House Bill No. 1221 was signed into law, now codified as 52 Okl. Stat. §§ 541-547 (West Supp. 1986) ("the Act"). The Act sets forth a comprehensive scheme for the distribution of revenues among owners in a well. The purpose as stated in Section 541 is the protection of "the rights and correlative rights of all interest owners of natural gas wells and wells producing casinghead gas and to afford all such owners an equal opportunity to extract their fair share of gas and to sell and be paid in proportion to their interest therein." This remedy was fashioned by the legislature to provide for an equitable distribution of revenues from a well for that owner who participates in the drilling of a well, has advanced costs for such drilling, yet is unable to contract with a purchaser for his share of production. Such owner, in the past, was forced to sit idly by while the well, though producing, produced only a contracted owner's gas. Under the Act, however, each contracted owner must share revenues received from production with non-contracted owners who have not otherwise entered into gas balancing agreements or other such agreements.

This significant change is made possible through the language found in Section 544. Section 544 espouses a molecular theory of mineral ownership in production. "The amount of gas produced daily, irrespective of the owner producing, belongs to, is owned by, and shall inure to the benefit of each owner in the well in proportion to each owner's interest in the well."

Pursuant to Section 547, the Oklahoma Corporation Commission, by Order No. 250466 entered on December 21, 1983, promulgated rules to implement the Act.

The Appellants appealed to the Oklahoma Supreme Court to overturn the Commission rules and underlying statutes. *Dennis E. Seal et al. v. Corporation Commission of the State of Oklahoma,* No. 61636, consolidated with *Amerada Hess Corporation et al. v. Corporation Commission of the State of Oklahoma,* No. 61652. On June 17, 1986, the Oklahoma Supreme Court issued the opinion upholding the statutes against all state and federal constitutional challenges and finding such legislation a reasonable exercise of the state's police power. The Oklahoma Corporation Commission rules were also held to be valid except as to certain timing and liability provisions. Appellants thereafter timely filed petitions for rehearing. Response to such petitions was not ordered by the Court and thereafter the petitions were denied without opinion on September 10, 1986. From such action this appeal was brought.

ARGUMENTS IN SUPPORT OF MOTION TO AFFIRM OR DISMISS

I. Appellants' Alleged Federal Regulatory "Scheme" With Which The Questioned State Statutes Conflict Does Not Exist

Appellants' argument presented under their first jurisdictional question regarding the impact of the Court's recent decision in *Transcontinental Gas Pipe Line Corp. v. State Oil and Gas Board,* — U.S. —, 106 S.Ct. 709, 88 L.Ed.2d 732 (1986), ("*Transco*") should be dismissed by the Court. The question was contained in Appellants' Petition for Rehearing before the Oklahoma Supreme Court. However, the Oklahoma Court did not request the Appellee Commission to respond to the Petition and, therefore, the question was not fully briefed and argued before the state court. The Oklahoma Supreme Court disposed of

Appellants' Petition summarily by minute order denying rehearing.

Further, in framing its argument under its first jurisdictional question, Appellants artfully construct a federal regulatory "scheme," consisting of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 et seq. which concerns price, supply and demand of deregulated natural gas, i.e. purchasing practices, and then proceed to demonstrate a conflict between such federal regulatory scheme and the Oklahoma statutes which are the subject of this appeal. However, the Oklahoma statutes concern sharing of revenues received on production by contracted owners with non-contracted owners in a single wellbore based on a molecular theory of mineral ownership. Appellants' have made a quantum leap in logic to attempt to bring the state statutes within the prohibitions enunciated by the Court in *Transco, supra.*

Indeed, the state statutes do not conflict in any manner with the prohibitions enunciated in *Transco, supra.* The state statutes do not require producers to share their markets. The statutes do, however, require sharing of revenues received from production under certain conditions. There is nothing inequitable in that requirement since, under 52 Okl. Stat. § 544, each molecule of gas produced, "irrespective of the owner producing, belongs to, is owned by, and shall inure to the benefit of each owner in the well in proportion to each owner's interest in the well."

Nor do the state statutes have the effect of raising prices. Under Section 546, "[n]othing in this act shall be construed as setting the price, terms or conditions under which a purchaser takes the production of a well or setting any restrictions, limitations, floor or ceiling on the price to be paid for such production . . . " There is no interference with

Congressional intent that the price of deregulated gas be determined by market forces.

Nor is there any requirement, as there was in the Mississippi regulation overturned in *Transco, supra,* that a purchaser connect a well that such purchaser is not already obligated to connect.

The state statutes do not conflict in any manner with the prohibitions set forth in *Transco, supra,* and, thus, do not violate the Supremacy Clause of the United States Constitution, art. VI, cl. 2. Hence, there is no substantial federal question to support this appeal.

II. Appellants Have Not Been Deprived Of Due Process Of Law By Requiring The Ratable Sharing Of Revenues Among Those Sharing Interests In Production

The thrust of Appellants' argument presented under their second jurisdictional question is that the Oklahoma Supreme Court has redefined "correlative rights" as referring to the relationship among owners in a single wellbore. Appellants fail to address why this redefinition is prohibited in light of the significant change made by the Legislature in the molecular theory of mineral ownership. 52 Okla. Stat. § 544 (West Supp. 1986).

The breadth of the state's power to regulate the production of oil and gas, and to thus limit the rights of oil and gas producers in their exertion of ownership, was recognized in the case of *Champlin Refining Co. v. Corporation Commission of Oklahoma,* 286 U.S. 210 (1932), where the Court stated, at page 233:

> In Oklahoma, as generally elsewhere, land owners do not have absolute title to the gas and oil that may permeate below the surface.

> These minerals, differing from solids in place such as coal and iron, are fugacious and of uncertain movement within the limits of the pool. Every person has the right to drill wells on his own land and take from the pools below all the gas and oil that he may be able to reduce to possession, including that coming from land belonging to others; but the right to take and thus to acquire ownership is subject to the reasonable exertion of the power of the State to prevent unnecessary loss, destruction or waste. And that power extends to the taker's . . . unreasonable and wasteful depletion of a common supply of gas and oil to the injury of others entitled to resort to and take from the same pool. *Ohio Oil Co. v. Indiana,* 177 U.S. 190 [citations omitted.]

This power was given a somewhat broader reading by the Court in *Hunter Company, Inc. v. McHugh,* 320 U.S. 222, 227 (1943):

> We have held that a state has constitutional power to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment. [citations omitted.]

Appellants argue that the State is limited to affecting rights only as they relate to owners of interests between wells. This argument fails logically in that there simply exists no reason to differentiate between those interests of

co-owners in a common source of supply as they relate to separate wells and those interests of co-owners in a common source of supply being produced from a single well. In both instances the potential exists for one party to act to the detriment of the interests of others. It is beyond doubt that the state has the right to modify property concepts to protect the various interests of owners in a common source of supply. This is the common thread in the previously cited cases. That right logically extends to the protection of the rights of those owners' interests as they exist in a single well.

The state statutes questioned on appeal protect the legitimate interests of the citizens of the state. It is a proper exercise of the police power and "substantially related to a legitimate end sought to be attained." *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186 (1950).

III. There Is No Impairment Of Obligation Of Contracts In The State Statutes' Application To Proceeds Of Production Received After The Effective Date Of The Legislation But Under Contracts Entered Into Prior To Such Effective Date

Appellants' argument under their third jurisdictional question is largely a restatement of their first question. Appellants recognize that *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), is controlling and that the *Allied* test has not changed. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400 (1983); *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983). Yet Appellants argue that *Transco, supra*, has somehow changed the test. For the reasons stated in Argument I herein such argument falls.

CONCLUSION

For the reasons that there is no substantial federal

question and the State's power to regulate production of gas and to limit the rights of producers of gas in their exertion of ownership was definitively decided by the Court in *Champlin Refining Co. v. Corporation Commission of Oklahoma, supra,* this Court should affirm the judgment of the Supreme Court of Oklahoma or, in the alternative, dismiss the appeal herein.

Respectively submitted,

LINDIL C. FOWLER, JR.
General Counsel
GRETCHEN P. HOOVER
Deputy General Counsel
Corporation Commission of the
State of Oklahoma
460 Jim Thorpe Building
2101 N. Lincoln Blvd.
Oklahoma City, Oklahoma 73105
(405) 521-2255

Counsel for Appellee